BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE: BRADLEY COUNTY BOARD OF EDUCATION, Petitioner, vs. [redacted] Respondent.	)	No. 00-14

FINAL ORDER

Howard W. Wilson
Administrative Law Judge
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Murfreesboro, Tennessee 37130

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[To protect the confidentiality of the minor student, [redacted] will be referred to as "E" on all remaining pages of this decision]

FINAL ORDER
CASE NO.: 00-14

A Due Process Hearing was requested by counsel on behalf of the Bradley County Board of Education. On February 15, 2000, the Division of Special Education, Tennessee Department of Education appointed this Administrative Law Judge to hear the case. A Pre Conference Order was issued on February 23, 2000. The 45 day rule was requested to be waived and the Court granted this request for good cause. The case was heard in Cleveland, Tennessee on May 24, 2000 and in Murfreesboro, Tennessee on June 7 and 14, 2000 and in Nashville, Tennessee on July 6, 2000.

I. Findings of Fact

The student, E, is a 14 year old student enrolled in the Bradley County School System. Since arriving in Tennessee from Florida the student has been evaluated three time by the school system to determine whether he is eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA). Each of these time the determinations has been that he does not qualify for services under IDEA. For each of these evaluations the student's parent signed an integrated assessment report, agreeing with the conclusion that the student was not entitled to special education and related services. (Exhibit 2, Exhibit 4, Exhibit 11). The first evaluation completed by Bradley County indicates that the student previously had been tested in Florida for special education and found to be functioning in the average range of intellectual ability and in the low average range of academic achievement. The Florida data indicated no need for further psychoeducational evaluation at that time. (Exhibit 1).

On January 5, 1999, Bradley County issued a Psycho-Educational Report on E. It found his intelligence to be in the average range, no learning disabilities but recommended a behavior management plan. Correspondence between the parent and the school district began soon after the report was released. By the end of the school year, a decision was made to put off any further evaluations till the beginning of the next school year. During the first semester of the next school year, the parent and school district met as an assessment team and wrote an Assessment Plan. The appropriate evaluations were completed by Katherine Ingram, a psychologist for Bradley County School District. Ms. Ingram is a school psychologist and also has licenses and endorsements in special education and general education.

Seven separate and distinct evaluative instruments were used in this December, 1999 assessment, as well as extensive classroom observations, teacher/parent/student interviews, and record reviews. The student's parent gave permission for this assessment, (Exhibit 7) and she participated fully in creating the assessment plan. (Exhibit 6). At the time of the development of the assessment plan she was represented by and was consulting with Suzanne Michelle, a staff attorney with the Tennessee Protection and Advocacy, Inc. (Tr., 5/24/00, 38-9 to 40-6). The parent was given a copy of her rights. She had received her rights on several prior occasions, had read them more than once, (Tr., 5/24/00, 13-16 to 21), had even had them read to her several times, and had expressed no difficulty in understanding that signing the integrated assessment report meant that her child was not eligible for special education and related services. (tr., 6/14/00, 136-25 to 138-10; Tr., 6/14/00, 34-14 to 37-25).

The evaluation was presented to the IEP Team on January 26, 2000. (Exhibit 10). No learning disabilities were identified and he was found not eligible as other health impaired. The evaluation report notes Dr. Knowles diagnosis of Seizure Disorder and that he is taking Depakote and Ritalin. It also notes that the student has compulsive behavior, a drive for perfection and is easily frustrated. It also said his medical conditions do not have a significant adverse effect on his educational performance, however the report stated that due to frequently of inappropriate behaviors in some classes, the student may benefit from a behavior management plan. (Exhibit 10).

On February 8, 2000, the staff attorney for Tennessee Protection and Advocacy, Inc., wrote a letter to the Bradley County School District's Counsel asking for an independent educational evaluation. (Exhibit 8).

On February 10, 2000 Vicki Beaty, Director of Special Education for Bradley County School District, sent a letter to the parent attaching a list of independent evaluators, their addresses and telephone numbers. This list included nineteen persons or groups qualified to perform a psychological evaluation and who were located in the general geographical area of the school system. This list also contained a cost range for this testing of from $250 to $500. (Exhibit 15).

On February 15, 2000 Bradley County school filed a request fro an impartial due process hearing under the authority of 34 CFR 300.502(b)(4) based on its belief that its evaluation was appropriate.

The parent chose to ignore the list of evaluators and instead chose to have the testing performed by Dr. Weiss of Nashville, Tennessee. In late March, 2000, E was evaluated by Dr. Weiss in her office. The only history Dr. Weiss took was from the

parent, and at the time of her report the only school records she possessed were the Ingram evaluation and some grades. She never saw the student in an educational environment, never visited the school, and chose not to talk to any teachers or administrators. (Tr. 6/7/00, 96-17 to 97-5) Her assessment resulted in a document titled "Psychological Evaluation" of which there were two drafts and a final version. The first version had no conclusion that the student met criteria for special education, but the next two versions added a section 5, which was a conclusionary finding that the student met criteria. (Exhibit 16, Exhibit 17 and Exhibit 18). Dr. Weiss admitted to adding Section 5 conclusion to her report after talking with the parent. (Tr. 6/7/00, 109-9 to 13).

Dr. Pamela E. Guess, who was designated by the Court as an expert in school psychology, heath related/clinical psychology and assessment (Tr., 6/14/00, 145-3 to 19) testified that the Weiss report was not appropriate due to the lack of observational data. (Tr., 6/14/00, 154-2 to 11). The reason that observational data in the class is so important (Tr., 6/14/00, 148-7 to 25) is that a child could meet criteria for having a disability but only would be eligible for services if the disability caused an adverse effect on educational performance. (Tr., 6/14/00. 149-1 to 150-21). Her testimony is consistent with state regulatory requirements.

II. Issues

1. Whether the student lacks standing to request an independent neuropsychological evaluation at school system expense.
2. Whether the psychological evaluation conducted by the school system was appropriate.
3. Whether the neuropsychological evaluation for which the student wishes to be reimbursed was appropriate.

III. Conclusions of Law

The IDEA provides that a child shall be evaluated in each area of suspected disability. The evaluation shall be used by the IEP team to determine if the child meets the definition of a "child with a disability." 20 USC 1400 et. seq. Under the Act it is only a child with a disability who has a right to procedural safeguards of which one is a Independent Educational Evaluation.

> The procedures required by this section shall include --
> (1) an opportunity for the parents of a child with a disability to . . . obtain an independent educational evaluation.

20 USC 1415(b)(1) (emphasis added). Similarly, the pertinent regulation applies only to a child with a disability:

> (a) General. (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

34 CFR 300.502(a)(1) (emphasis added)

The definition of a "child with a disability" under the Individuals with Disabilities Act is as follows:

> The term 'child with a disability' means a child --
> (i) with mental retardation, hearing impairments (including deafness), visual impairments (including blindness), serious emotional disturbance, (hereinafter referred to as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

20 USC 1401(3); see also 34 CFR 300.7

Procedural flaws do not automatically require a finding that a school system has denied a child a free appropriate public education. However, procedural flaws that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a free appropriate

public education. W.G. v. Board of Trustees of Target Range School District, 960 F. 2d 1479, 1483 (9th Cir. 1992). Further, the Sixth Circuit has held that technical defects do not result in a violation of the IDEA if there is no substantive harm. Thomas v. Cincinnati Board of Education, 918 F. 2d 618, 625 (6th Cir. 1990). Any perceived difficulty with procedural issues which do not rise to a level of actual violations for which a remedy may exist because the school system has substantially complied with the Individuals with Disabilities Education Act (IDEA) fail. Cordrey v. Euckert, [917 F.2d 1460, 17 EHLR 104 (6th Cir. 1990), cert. den. 111 S. Ct. 1391 (1991)]. It would be inappropriate to "exalt form over substance" by holding that alleged technical deviations rendered the school system liable. Doe v. Defendant I, [898 F 2d 1186, 1190-91 (6th Cir. 1990)] Finally, only harmful violations described in Doe v. Alabama State Department of Education, [915 F. 2d 651 (11th Cir. 1990)] would entitle a child to relief.

One of the most important procedural rights secured by the IDEA is the right to a proper evaluation. Under 34 CFR 300.532, tests and evaluation materials must include those tailored to assess specific area of educational need and not those that are designed to provide a single general intelligence quotient. [34 CFR 300.532(b)]. Further, the child must be assessed in all areas relating to the suspected disability, including, if appropriate, academic performance. [34 CFR 300.532(g)]. Under 300.333, the school system must draw upon a variety of sources, including aptitude, and achievement tests, in making placement decisions. [34 CFR 300.533(a)(1)]. Further, the school system is obligated to obtain this information and ensure that it is documented and carefully considered. [34 CFR 300.533(a)(2)].

For a parent to obtain an independent educational evaluation at school district expense, the parent must disagree with an evaluation obtained by the public agency. 34 300,502(b) (1).

The IDEA sets forth in detail the requirements for an evaluation to be appropriate, stating that the school system must:

> (A) Use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individual education, plan, including information related to enabling the child to be involved in and progress in the general curriculum . . .
> (B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
> (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 USC 1414(b)(2). The Act further requires that the school system ensure that:

> (A) tests and other evaluation materials used to test a child . . .
> (i) are selected and administered so as not be discriminatory on a racial or cultural basis, and
> (ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and
> (B) any standardized tests that are give the child --
> (i) have been validated forth specific purpose for which they are used;
> (ii) are administered by trained and knowledgeable personnel; and
> (iii) are administered in accordance with any instructions provided by the producers of such tests;
> (C) the child is assessed in all areas of suspected disability; and
> (D) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

20 USC 1414(b)(3).

Thus, the test for appropriateness is whether the school system's own evaluation was in compliance with the IDEA. See Houston Indep. School Dist., 30 IDELR 564 (ALJ

Texas 1999); San Antonio Indep. Sch. Dist., 29 IDELR 630 (ALJ Texas 998); and Fallbrook Union elementary Sch. Dist., 28 IDELR 678 (ALJ California 1998).

Classroom observations are required under Tennessee state regulations implementing the state special education statute:

> The individual assessment **shall include an observation** by an M-Team (now IEP) member (other than the child's teacher) **of the child's academic performance** and, where appropriate, an observation of the child's behavioral performance in the regular classroom setting or, if the child has not be previously enrolled in school, an observation in an environment appropriate for a child of that age. (emphasis added)

CRR of Tennessee Chapter 0520-1-3-.09(4)(a)(5)(ii), p33. Further,

> **Classroom observations must be included in each individual assessment**, unless clearly not feasible, as may be the case with homebound students. **Although the observation is required to be done in the regular classroom setting**, for a child with an articulation disorder, a speech teacher, or therapist may do an observation of the child's articulation behavior in conversational speech. (emphasis added)

State Implementation Policies and Procedures, CRR of Tennessee, Chapter 0520-1-3-.09(4)(a)(5)(ii), p.33

IV. Conclusions Applying the Law

Parents are to be given written notice whenever a school system either proposes to change or refuses to change the child's evaluation, educational placement or the provision of a free appropriate public education to the child. This the school did, while in a crude and antiquated way, when the school district provided the parents with a copy of the minutes of the IEP team meeting in which the parents participated. The parent had written results of the IEP team meeting as well as the parent participated fully in the discussions and deliberations at the meeting. (Exhibits 2, 4, 11, 13, and 15).

Any claimed procedural flaws or violations were inconsequential at worst, and were therefore of the "non-harmful" variety; therefore, the student is entitled to no relief from the School system in this case due to minor procedural difficulties. Mere technical violations of IDEA procedures, which do not deny meaningful parental participation, do not render a school systems actions inappropriate. Doyle v. Arlington County Sch. Bd., 19 IDELR 259 (E.D. Va. 1992)

The student has been evaluated a total of four times for special education and had never been found eligible by an IEP Team. On January 16, 1997 the parent signed an integrated assessment report stating that the student did not meet criteria for special education and related services. (Exhibit 2). Again, on January 19, 1999 she signed an integrated assessment report stating the same thing. (Exhibit 4). On January 26, 2000 the student's parent once more signed an integrated assessment report stating that the student was not eligible. (Exhibit 11). Thus, since the student has been determined not to qualify under the Act, E is not a "child with a disability" within the meaning of the Act and its implementing regulations and therefore is not entitled to the protections of the Act, and therefore is not entitled to an independent education evaluation under the Act.

The regulations are very specific that in order to obtain an independent evaluation at school system expense certain criteria must be met: the parent must first disagree with the evaluation by the school system, the independent evaluation must meet the standards of the agency, and if the matter is taken to a due process hearing, the hearing officer must find the school system's evaluation inappropriate. (34 CFR 300.502). There has been no disagreement with the school system's evaluation, as demonstrated by the parent's consistent, historical agreement with the school system's integrated assessment reports.

including the one now in question. (Ex. 2, Ex. 4, Exhibit 11.) Disagreement is a threshold requirement:

> A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

34 CFR 3..0502(b) (1) (emphasis added)

The evaluation that the parent disagreed with is a psychological evaluation for the purpose of determining eligibility, while the evaluation the parent seeks appears to be either an initial neuropsychological evaluation done by the person of her choice or additional psychological testing for purpose beyond the scope of the school system's assessment report. Dr. Weiss testified that her report was a neuropsychological report because she is a neuropsychologist, (Tr. 6/7/00, 82-23 to 83-19), and to the extent there is a difference between a psychological evaluation and a nueropsycholigical evaluation, the parent was required to allow the school system the opportunity to perform its own evaluation first with its own people. "[T]he initial [evaluation] is a school's opportunity to utilize its own staff, or to contract with whomever it choose . . . and to provide its own assessment." Fallmouth Public Schools, 28 IDELR 556, (Ga. SEA 1998). A school system must be given the opportunity to conduct its own evaluation before it can be required to pay for an independent evaluation, and the failure of the parent to request a neuropsychological evaluation or evaluation for different purposes by the school system first, especially after initially agreeing with the school system's evaluation and resulting Integrated Assessment Report and IEP, bars the parent from requesting reimbursement for the Weiss evaluation.

The unchallenged proof demonstrated that the statutory and regulatory criteria was met in the Ingram report. (Tr., 6/14/00, 17-11 to 20-8; Tr., 6/14/00, 108-1 to 115-2; Tr.,

6/14/00, 123-35 to 125-5. No one testified that the report was not correct. All of the school system personnel, who were recognized as experts in their field by the Court, testified that in their respective opinions the evaluation and report were appropriate. (Tr., 6/14/00, 47-11 to 14; Tr., 6/14/00, 118-1 to 5)

The proof was clear that Dr. Weiss did not follow required procedures in evaluating E. She readily admitted that she conducted no classroom observations of her own, a required element of the assessment process. (Tr., 6/7/000, 96-17 to 97-5). She stated that all the information she had when forming her opinion was in her report (Tr., 6/7/00, 89-7 to 18) and nowhere in her reports are referenced any observations she did herself in the educational setting. (Exhibit 16, Exhibit 17, and Exhibit 18). She stated that she only observed him the time he was with her in the clinical setting. (Tr. 6/7/00, 90-4 to 8). This is fatal to the parent's claim for reimbursement.

Dr. Weiss rendered three drafts of her report. The first one had no conclusion that the student met criteria for special education, and the next two added a finding that he met criteria. (Exhibits 16, Exhibit 17 and Exhibit 18). She admitted to adding this conclusion to her report after talking with the parent. (Tr., 6/7/00, 109-9 to 13). The Court finds that this is inappropriate on the part of the professional evaluator . She has not followed the state regulations requiring a direct observation in her evaluation. This fatally invalidates her evaluation.

V. Order

Dr. Weiss's independent evaluation does not meet state minimum standards, and therefore the parents are not entitled to reimbursement by the Bradley County Board of Education.

IT IS THEREFORE ORDERED, that the school district's evaluation (Ingram Report) is appropriate and meets the legal mandates of the Act.

IT IS FURTHER ORDERED that E is not entitled to an independent educational evaluation since the student does not meet the federal definition of a "child with a disability" within the meaning of the phase in the IDEA.

IT IS FURTHER ORDERED the independent evaluation of Dr. Weiss does not meet state educational standards and is therefore inappropriate.

IT IS FURTHER ORDERED the request for reimbursement of the Weiss evaluation is denied.

IT IS FURTHER ORDERED that the school system is the prevailing party for all purposes.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision may appeal to the Davidson County Chancery Court of the State of Tennessee, or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the entry of the Final Order in non-reimbursement cases and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing Court may direct this Final Order be stayed.

ENTERED, this the 11th day of October, 2000.

Howard W. Wilson 014007
Administrative Law Judge
6 Pubic Square, North
Murfreesboro, Tennessee 37130

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 11th day of October, 2000, to counsel for the school system, John Kitch, Esq., Suite 305, Hillsboro Pike, Nashville, TN 37212; counsel for the parents, Ms. Suzanne Michelle, Esq., Tennessee Protection & Advocacy, 2416 21st Ave. South, Nashville, TN 37212; and to the Division of Special Education, State Department of Education, Nashville, TN 37243-0375.

Howard W. Wilson